SUPREME COURT, U. S.

FILED
JUL 10 1968
JOHN F. DAVIS, CLERK

No. 176

In the Supreme Court of the United States

OCTOBER TERM, 1968

FELIX BENITEZ REXACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question in this case is whether petitioner should be taxed as a citizen or as an alien for the period between his 1958 renunciation of citizenship and the State Department's acceptance of his 1962 assertion that the renunciation had been involuntary and ineffective.

For many years petitioner resided in the Dominican Republic, where he had extensive business interests. On July 14, 1958, he made a formal, written renuncia-

tion of his United States citizenship before a United States consular officer in the Dominican Republic as allowed by Section 349(a)(6) of the Immigration and Nationality Act, c. 477, 66 Stat. 163, 268 (8 U.S.C. 1481(a)(6)). (Pet. 18, 24, 36-37.) In March 1962, following the fall of the Trujillo regime, petitioner sought an American passport in Santo Domingo, stating that his 1958 renunciation had been involuntary. The passport was denied at the consular level, but upon referral of the issue to the Department of State, the Board of Review on the Loss of Nationality, on June 25, 1962, accepted petitioner's claim that his renunciation was compelled by his fear of financial ruin and physical harm at the hands of the Dominican government. The Board thereupon reversed the 1958 determination that petitioner had expatriated himself and a passport was issued. (Pet. 18-19, 24-31).

The Commissioner of Internal Revenue asserted jeopardy assessments against petitioner for the calendar years 1959 and 1961 and the United States brought this action to satisfy those assessments by enforcing liens on petitioner's property in Puerto Rico. The assessments were based on petitioner's receipt of $1,552,000 from the Dominican Republic in 1961 on his claims for services performed from 1951 through 1956.[1] (Pet. 18). Petitioner moved for summary judgment on the ground that his renuncia-

[1] Petitioner had paid the $1,552,000 to the Dominican Government as taxes for 1951 through 1956 and received foreign tax credits against his United States taxes for 1951 through 1956.

tion of citizenship gave him, for tax purposes, the status of an alien during those years.[2] The district court denied the motion, but certified the question for interlocutory appeal pursuant to 28 U.S.C. 1292(b). (Pet. 17-22). The court of appeals affirmed (Pet. 23-25).

The decision below is correct and raises no conflict with other decisions. It is not of general importance in the administration of the tax laws, and there is no other reason for further review.

1. The court of appeals correctly held that petitioner never lost his status or his obligations as a United States citizen and therefore is subject to income taxation as a citizen for the years in issue. The procedure itself followed, and the order vacating his expatriation, necessarily signifies an unbroken continuity in his citizenship. On no other theory could petitioner have regained his passport without naturalization proceedings. See, *e.g.*, *Sittler* v. *United States*, 316 F.2d 312 (C.A. 2); *Petition of Sproule*, 19 F. Supp. 995

[2] Special provisions for the taxation of the income of nonresident aliens are set forth in Sections 871-878 of the Internal Revenue Code of 1954. In general the tax is limited to income from businesses or other sources within the United States. A citizen, on the other hand, escapes taxation only on "amounts received from sources, without the United States * * * which constitute earned income attributable to services performed" either while (Section 911(a)(1)) "a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year" or (Section 911(a)(2)) "who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days." Generally speaking, citizens (Section 901(b)(1)) and aliens (Sections 901(b)(3), 901(b)(4), 906) receive credit against United States taxes for taxes paid to foreign governments.

(S.D. Calif.); Act of June 14, 1902, c. 1088, 32 Stat. 386, amending Section 4076, Revised Statutes (22 U.S.C. 212). Having demanded and received a decision that he never lost his status as a citizen there can be no foundation for allowing him an exemption from taxation which is only available to aliens. See *Cook* v. *Tait*, 265 U.S. 47.

2. As the court of appeals noted (Pet. 25), petitioner conceded "that as a matter of law he is precluded by the record from claiming that he ever ceased to be a United States citizen." Thus petitioner's argument that he (Pet. 13) "occupied the status of a non-resident alien" during the years in question and that (*ibid.*) "[a]s a matter of fact he was not an American citizen during said period," was not properly raised below and should not be considered here. See *United States* v. *Fleischman*, 339 U.S. 349; *Federal Trade Commission* v. *Travelers Health Assn.*, 362 U.S. 293.

3. Petitioner's status is not comparable to that of persons expatriated under Section 349(a) of the Immigration and Nationality Act, *supra* (8 U.S.C. 1481) (Pet. 36-39) and whose expatriations may be invalid by reason of this Court's decision in *Afroyim* v. *Rusk*, 387 U.S. 253. The interim status of such persons presents difficult questions which may or may not lead to the result reached in the present case, since they were expatriated irrespective of their personal desire to maintain their United States citizenship. Here, in contrast, the State Department has done what petitioner wanted it to do. The duty to pay taxes does not depend on the taxpayer's actually en-

joying specific benefits from the operations of the government during the years in question, as petitioner would have it (Pet. 12-16), but, rather, on the power of the legislature to tax citizens wherever they or their property might be found, a power premised "on the presumption that government by its very nature benefits the citizen and his property wherever found." *Cook* v. *Tait*, *supra*, 265 U.S. at 56.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY, 1968.

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CERTIORARI DENIED